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In The

Supreme Court of the United States

For the Third Circuit

October Term, 1968
No. 381

ALBERT J. MINICHELLO and NICHOLAS MAURIELLO on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated,

Petitioners

vs.

WILLIAM B. CAMP, Comptroller of Currency for the United States of America, FIRST NATIONAL BANK OF EXETER, WYOMING NATIONAL BANK OF WILKES-BARRE, AUGUST J. LIPPI, ETTORE LIPPI, JOHN LIPPI, JOHN B. CAMPBELL, GEORGE MAFFEI and HAROLD REICH,

Respondents

PETITION FOR REHEARING OF ORDER OF OCTOBER 14, 1968, ON PETITION FOR WRIT OF CERTIORARI

ARTHUR D. DALESSANDRO,
Attorney for Appellants

550 Miners National Bank Bldg.,
Wilkes-Barre, Penna. 18701

Murrelle Printing Company, Law Printers, 201-206 Lockhart Street, Sayre, Pa.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 381

Albert J. Minchello and Nicholas Mauriello, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of The First National Bank of Exeter, Similarly Situated,

Petitioners

vs.

William B. Camp, Comptroller of Currency for the United States of America, First National Bank of Exeter, Wyoming National Bank of Wilkes-Barre, August J. Lippi, Ettore Lippi, John Lippi, John B. Campbell, George Maffei and Harold Reich,

Respondents.

PETITION FOR REHEARING OF ORDER OF OCTOBER 14, 1968, ON PETITION FOR WRIT OF CERTIORARI

Petitioners, through their attorneys, respectfully submit to the Honorable Justice William J. Brennan this Petition for Rehearing of the Order of your Honorable

Court of October 14, 1968, denying a Writ of Certiorari in the above captioned matter and set forth in support hereof the following substantial grounds available to petitioners, which were not previously presented.

1. The decisions of the lower courts and especially the decisions of the Third Circuit Court of Appeals constitute a violation of the constitutional rights of petitioners in that they are equivalent to an ex post facto law in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Since the Legislature is barred by the ex post facto clause of the Constitution, a court is barred by the due process clause of the Constitution from achieving precisely the same results by judicial construction. Since the rights of petitioners were, at the time of the occurrences involved in this case, clearly and positively established by the then existing Supreme Court decisions, the failure of the Circuit Court to abide by the Supreme Court decisions is, in effect, creating new law after the petitioners' rights have been vested by prior existing law. The Circuit Court failed to abide by the standards of decisional consistency applicable to the facts of this case and the failure of the Circuit Court to abide by prior decisions of the Supreme Court was so unforeseeable as to deprive the petitioners of their rights established by the Constitution. *Bouie vs. City of Columbia, S. C.* (1964), 84 S. Ct. 1697; 378 U.S. 347; 12 L. Ed. 2nd 894. Constitution, Article I, Section 9, Clause 3, "No bill of attainder or ex post facto law shall be passed".

Spreet vs. Morganthau, 116 Fed. 2nd 301, 73 App. D.C. 70;

Sagastivelza vs. Puerto Rico Housing Authority, 195 Fed. 2nd 289;

Personal Finance Company of Braddock vs. United States, 86 Fed. Supp. 779 (D.C.-Delaware 1949);

Stancil vs. United States, 200 Fed. Supp. 36 (D. C. Virginia 1961).

The statute under which the Conservator was appointed (12 U.S.C.A. 203) and the statute which required court approval of the sale of a national bank in conservatorship (12 U.S.C.A. 192) provided due process of law remedies for the protection of property as guaranteed by the Constitution; however, in this case the Comptroller of Currency by completely ignoring the statute and failing to get court approval of the sale in effect repealed the above mentioned statute and thereby exercised legislative function. If the safeguard of due process (whereby a court order is required before a national bank in conservatorship can be sold) can be so easily lost by the acts of an administrative official, the statute is then meaningless and the due process of law is then nonexistent. What good is a protective statute requiring a court order if an administrative official can simply refuse to obtain a court order and have his conduct approved by a district and a circuit court? The case before the court is the same as a statute giving a citizen the right to vote but preventing him from casting his ballot by refusing to let him use the voting machine. Stated differently it is the same as a statute guaranteeing a black person equal employment opportunities and then when the black person applies for a job telling him that even

though that statute is on the books he cannot have a job because he is black. The circuit court's sanctioning of the Comptroller's conduct in this case clearly constitutes denial of due process of law to the petitioners through their great financial loss.

2. The decisions of the lower courts constitute a denial of due process of law to the petitioners as guaranteed to them by the Fifth and Fourteenth Amendments of the Constitution because the decisions constitute an impairment of the obligation of contract rights of the petitioners as set forth in Article 1, Section 10, Clause 1 of the Constitution.

The petition for Certiorari sets forth the opinion of the District Court Judge dated July 23, 1963, indicating that the offer of The First National Bank of Pittston was accepted by the directors of the Exeter Bank. (See pages 77-78 of Petition for Writ of Certiorari.) Despite this, the District Court and the Circuit Court failed to recognize that contract right in violation of petitioners' constitutional rights which guaranteed petitioners that no law would be passed impairing the obligation of contracts. The decision of the lower courts is equivalent to passing a law in violation of this constitutional right.

John McShain vs. District of Columbia, 305 Fed. 2nd 882, 92 U.S. App. D.C. 358;

Holderness vs. Hamilton Fire Insurance of New York, 54 F. Supp. 145, D.C. Florida, 1944.

3. The Statute (12 U.S.C.A. 181) under which the Comptroller acted pertaining to the alleged emergency and waiver of shareholder approval for voluntary liquida-

tion is unconstitutional in that it is unreasonable, arbitrary and capricious and is vague and uncertain and is therefore a denial of due process.

The reference to "an emergency" in 12 U.S.C.A. 181 is so vague and uncertain that men of common intelligence must necessarily guess as to its meaning and differ as to its application, and there is no fixed ascertainable standard for its application, thereby causing the Statute to fail to meet the requirements of due process of law under the Constitution.

Mallatt vs. Ostrander Ry. & Timber Co., D.C. Oregon 1942, 46 F. Supp. 250;

Standard Oil of La. vs. Porterie, D.C. La. 1935, 12 Fed. Supp. 100;

City of New Rochelle vs. Friedman, 78 N.Y.S. 2nd 681, 190 Misc. 654;

Giaccio vs. State of Pennsylvania, 86 Supreme Court 518, 382 U.S. 399, 15 L. Ed. 2nd 447;

Minski vs. U.S., 131 Fed. 2nd 614, 63 Supreme Court 1241, 319 U.S. 463, 87 L. Ed. 1519;

Ward vs. Auctioneers Association of Southern California, 153 P. 2nd 765, 67 Cal. App. 2nd 183.

The Circuit Court's decision stated, "The standard to be applied is not whether an emergency in fact existed but whether a reasonable man on the basis of facts of which he was aware or should have been aware could have reasonably concluded that an emergency existed." (p. 99 petition for Writ of Certiorari). This vague and

uncertain interpretation is proof that the term emergency is vague and uncertain and is also proof that there is no fixed ascertainable standard for the application of the term. The statute specifically stated "... unless an emergency *exists* . . ." (12 U.S.C.A. 181) (Emphasis Added) and despite this language the Circuit Court said, "The standard to be applied is *not* whether an emergency in fact existed . . ." (Emphasis added.) Further the statute did not say anything about the subjective intent of a reasonable man being the deciding factor. In addition the Circuit Court used the term itself to define the term, all of which is clear indication of the vagueness, uncertainly and guesswork involved in the interpretation of the term emergency.

4. The lower courts' decisions abridge the privileges of the petitioners who are citizens of the United States in that their privilege of using the District Court for passing on the legality and propriety of the sale has been denied them, contrary to the constitutional rights of the petitioners. Since by law it was mandatory that the Comptroller get court approval before the sale, the failure to do this is a plain abridgement of the privilege of the petitioners to use the District Court whose approval was necessary.

5. The decisions of the lower courts have denied the petitioners the equal protection of the laws as guaranteed by the Constitution. Since it is mandatory that court approval be obtained before the sale is made and since prior cases have affirmed this rule, the courts in those prior cases have protected the parties therein and yet in this case the lower courts have failed to protect the petitioners. The net result is that the petitioners in this

case are denied the protection of the law which has been granted to parties in cases previous to this (which were cited in the original Petition for Writ of Certiorari). Since the Comptroller has in effect interpreted the statute to mean that he is the one who will decide when court approval is necessary and since the lower courts have approved the Comptroller's conduct, it is obvious that not only the petitioners but any other party in the future would be denied the equal protection of the laws in that it would never be known who would have the right to use the courts and who would be refused the right to use the courts. The Constitution does not give the Comptroller the privilege or discretion to adversely affect the rights of the petitioners.

Wherefore, Petitioners respectfully request your Honorable Court to issue an Order granting the Writ of Certiorari.

Respectfully submitted,
ARTHUR D. DALESSANDRO,
JOSEPH J. USTYNOSKI,
ANTHONY C. FALVELLO,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

Arthur D. Dalessandro, certifies that he is one of the attorneys for the Petitioners and that the foregoing Petition is presented in good faith and not for delay, and he further certifies that the Petition is restricted to the grounds specified therein.

ARUTHR D. DALESSANDRO.